IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA BALLAS, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF READING, et al.	:	NO. 00-CV-2943

ORDER - MEMORANDUM

Padova, J. **July , 2001**

AND NOW, this day of July, 2001, upon consideration of Defendant's Motion for Summary Judgment on Qualified Immunity, (Doc. No. 59), and Plaintiff's Response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. Defendant Joseph Eppihimer is **GRANTED** summary judgment on Count Two of the Amended Complaint.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Evidence introduced to defeat or support a motion for summary judgment, however, must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

Plaintiff Maria Ballas ("Ballas") worked as purchasing manager for the City of Reading, Pennsylvania ("City") from 1987 until her discharge on April 28, 2000. Ballas' husband, Henry Lessig, a member of the City Planning Commission and the Solid Waste Collection Task Force, publicly spoke in support of comprehensive trash collection in the City. Defendant Joseph Eppihimer ("Eppihimer") opposed comprehensive trash collection. Eppihimer terminated Ballas on April 28, 2000. Ballas claims that she was discharged in retaliation for her husband's support for comprehensive trash collection.

Following resolution of a prior motion for summary judgment and motion to dismiss, the sole remaining claim is Count Two. Count Two is brought pursuant to 42 U.S.C. § 1983 and alleges that Defendants City and Eppihimer violated Ballas' rights under the First Amendment by firing her in retaliation for her husband's speech in support of comprehensive trash collection in the City of Reading. In the instant Motion, Defendant Eppihimer argues that he is entitled to qualified immunity on Count Two.[1] The Court agrees.

[1]By Order dated June 22, 2001, the Court granted Defendants leave to file a motion for summary judgment on the issue of qualified immunity of Eppihimer. Defendants filed said motion on July 13, 2001; Plaintiff filed a timely response on July 17, 2001.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 121 S. Ct. 1251, 1256 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Government officials have qualified immunity from suit under § 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The defendant has the burden of pleading and proving qualified immunity. Harlow, 457 U.S. at 815.

When resolving issues of qualified immunity, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right. Saucier, 121 S. Ct. at 2156; Torres v. McLaughlin, 163 F.3d 169, 172 (3d Cir. 1998) (internal citations omitted). If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. Saucier, 121 S. Ct. at 2156. Count Two alleges that Defendants violated Ballas' rights under the First Amendment by firing her in retaliation for her husband's speech in support of comprehensive trash collection in the City of Reading. Defendants sought summary judgment on this

count on the ground that Ballas lacked standing to assert the free speech rights of her husband. In a Memorandum dated June 12, 2001, the Court determined that Ballas had standing to assert her husband's speech as a basis for her suit. This ruling established that Plaintiff had alleged a constitutional violation based on the assertion of her husband's First Amendment right to free speech.

Having determined that a constitutional violation could be made out on a favorable view of the parties' submissions, the Court must then ask whether the right was clearly established. Saucier, 121 S. Ct. at 2156. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Id. Although a right may be clearly established even if there is no prior precedent that is directly on point,"[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." See Saucier, 121 S. Ct. at 2156 (internal quotations omitted); Eddy v. Virgin Islands Water and Power Auth., No.99-3849, 2001 WL 770088, at *2 (3d Cir. July 10, 2001). Accordingly, the relevant and dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Saucier, 121 S. Ct. at 2156; Eddy, 2001 WL 770088, at *2.

Under the circumstances of this case, the Court concludes that the right Plaintiff seeks to assert was not clearly established at the time of Eppihimer's conduct. In the June 12, 2001 Memorandum, the Court determined that Plaintiff had standing to assert the rights of her husband as a basis for her suit based on Kounitz v. Slaatten, 901 F. Supp. 650, 655 (S.D. N.Y. 1995), and an analysis of general prudential concerns for third-party standing under Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). Defendant contends that Plaintiff's protection from retaliation under the First Amendment free speech clause based on her husband's speech was not clearly established given that the only case supporting third-party standing to sue is a single case from the Southern District of New York. The Court agrees. District court decisions generally do not clearly establish the law of the circuit. Doe v. Delie, No.99-3019, 2001 WL 817680, at *9 n.10 (3d Cir. July 19, 2001). Given the highly ambiguous nature of third-party standing and the dearth of caselaw addressing the rights of spouses to enjoy protection from retaliation based on each other's speech, the contours of the right Plaintiff seeks to assert in the present context were not sufficiently clearly established. See Brown v. Grabowski, 922 F.2d 1097, 1118 (3d Cir. 1990). Accordingly, Defendant Eppihimer is entitled to qualified immunity from suit on Count Two as it is presently stated.

In her response, Plaintiff does not dispute Defendant's contention that the right to be free from termination for the speech of a third-party was not clearly established at the time Eppihimer acted, but instead argues that her termination violated clearly established law relating to the right of intimate association under the First Amendment. The right of intimate association, however, is a legal theory distinct from a First Amendment speech claim, see Adler v. Pataki, 185 F.3d 35, 43-44 (2d Cir. 1999), and is not the legal theory originally asserted in this case. Since initiation of the case, throughout resolution of a motion to dismiss, a motion for judgment on the pleadings, and discovery, Plaintiff purported to assert Count Two based on a First Amendment free speech violation. Plaintiff did not mention a potential freedom of association claim under the First Amendment until her response to Defendant's first Motion for Summary Judgment. In that response, she proposed an association claim as an alternative recovery theory should the Court determine that she lacked standing to sue for a free speech violation based on her husband's speech. In the June 12, 2001 Memorandum, the Court expressly declined to permit Plaintiff to amend her pleading to assert such a claim. In response to the instant Motion, Plaintiff again seeks to amend her pleadings to assert an association claim. The Court denies Plaintiff's latest request.

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading after a responsive pleading is served only by leave of the court, and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend may be denied where there is undue delay or prejudice. Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). The question of undue delay centers on the plaintiff's motives for not amending her complaint earlier. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 614 (3d Cir. 1987). The party seeking leave to amend bears the burden of explaining the reasons for the delay. LePage's Inc. v. 3M, No.Civ.A.97-3983, 1998 WL 631960, at *4 (E.D. Pa. Sept. 2, 1998). Plaintiff has presented no reason whatsoever to explain her delay in asserting an intimate association claim in this case until the summary judgment stage. Furthermore, altering the theory of her case now would result in substantial prejudice to Defendants. "[P]rejudice to the non-moving party is the touchstone for the denial of the amendment." Cornell & Co. v. Occupational Safety and Health Rev. Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). Prejudice in the context of Rule 15(a) means "undue difficulty in prosecuting [or defending] a lawsuit as a result of a change in tactics or theories on the part of the other party." Deakyne v. Comm'rs of Lewes, 416 F.2d 290, 300 (3d Cir. 1969). To permit Plaintiff to substantially change her theory of the case after the close of discovery would cause Defendants undue difficulty in defending the

suit.

Even if amendment of the pleadings were permitted, Plaintiff's rights under the First Amendment intimate association theory were not clearly established at the time of Defendant's acts. Plaintiff cites two cases in support of the proposition that her rights were clearly established, Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988), and Adler v. Pataki, 185 F.3d 35, 43-44 (2d Cir. 1999). Rode addressed the issue of freedom of association only in vague terms, without delineating the content or nature of that right. Rode, 845 F.2d at 1205. As such, it did not clearly establish the right in this circuit. While the Adler court did address an association claim under circumstances similar to those presented here, the court acknowledged that the nature and extent of the right to be free of retaliation based on familial association is "hardly clear," and that courts have applied varying standards to determine the scope of such a right. See Adler, 185 F.3d at 43-44. Furthermore, the existence of a single case from a different circuit one year prior to the alleged act permitting suit based upon a new and somewhat amorphous legal theory is insufficient to clearly establish that right. See Adler, 185 F.3d at 44; Grabowski, 922 F.2d at 1118; see also, Doe, 2001 WL 817680, at *9 (finding right not clearly established because of lack of binding precedent in this circuit and ambivalency of most analogous appellate case).

For the foregoing reasons, Defendant Eppihimer is entitled to qualified immunity on either a theory of free speech or freedom of association. The Court accordingly grants Eppihimer summary judgment on Count Two.

BY THE COURT:

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John R. Padova, J.